

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Andros, Inc., dba Georgia's Greek Restaurant;
Marieli Cestari-Cuenca; and Oscar Flores-
Camacaro,

Plaintiffs,

vs.

United States of America; U.S. Department of
Labor; Hilda L. Solis, Secretary of USDOL
U.S. Citizenship and Immigration Services;
and Gerard Heinauer, Director of Nebraska
Service Center,

Defendants.

No. C10-303Z

ORDER

THIS MATTER comes before the Court on the motion for summary judgment, docket no. 17, filed by Defendants United States of America, United States Department of Labor ("DOL"), Secretary of DOL Hilda L. Solis, Director of United States Citizenship and Immigration Services ("USCIS") Alejandro Mayorkas, and Director of Nebraska Service Center Gerard Heinauer (collectively the

1 “Government”), and the cross-motion for summary judgment, docket no. 18, filed by
2 Plaintiffs Andros, Inc., Marieli Cestari-Cuenca (“Cestari”), and Cestari’s husband,
3 Oscar Flores-Camacaro (“Flores”). The Court construed arguments in Plaintiffs’
4 Reply, docket no. 22, as a motion to substitute T. Kazakos, Inc. for Andros, Inc. as the
5 real party in interest, and permitted the Government to file supplemental briefing in
6 response. See Minute Order, docket no. 24. The Government has indicated no
7 objection, and the Court therefore GRANTS Plaintiffs’ motion to substitute. Having
8 reviewed all papers filed in support of and in opposition to the remaining motions, the
9 Court now enters the following Order.
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12 **BACKGROUND**

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14 On February 18, 2010, Plaintiffs filed the present complaint seeking declaratory
15 and injunctive relief. Plaintiffs seek judicial review of the regulation,¹ which
16 invalidated Andros, Inc.’s labor certification. Alternatively, Plaintiffs ask the Court to
17 apply equitable tolling to the validity period and order USCIS to adjudicate Andros,
18 Inc.’s I-140 petition.² Plaintiffs’ ultimate goal in seeking relief from this Court is to
19 enable Cestari to apply for an employment-based immigrant visa.
20

21 On January 29, 2000, Cestari, a national of Venezuela, was admitted to the
22 United States on an F-1 student visa. Administrative Record A095560921 (“AR”) at
23

24 ¹ Prior to the amendment of the regulation, labor certifications were valid indefinitely. 20
25 C.F.R. § 656.30(a) (2006). Following a notice and comment rulemaking process, the DOL
26 amended the regulation (with an effective date of July 16, 2007) to impose a 180-day validity
period to approved labor certification. 20 C.F.R. § 656.30(b).

² The Court does not reach the issues on the merits because the Court concludes that Plaintiffs
lack standing.

1 L8, L13. On September 16, 2000, Flores, also a national of Venezuela, entered the
2 United States on an F-1 student visa. AR at L27. Sometime in April of 2001, Cestari
3 began working for Andros, Inc. AR at R17. Plaintiffs do not dispute that Cestari was
4 not authorized to be employed in the United States based on her F-1 student visa.
5

6 Plaintiffs allege that an Application for Alien Employment Certification (Form
7 ETA-750) on behalf of Cestari was mailed and received by DOL on or around April
8 30, 2001. SAR at 50, ¶¶ 3-4. On February 21, 2002, Plaintiffs refiled a Form ETA-
9 750 application (Id. at 51, ¶ 6) (Andros, Inc. as petitioning employer and Cestari as
10 beneficiary), and that application was approved by DOL on October 16, 2006. Id. at
11 16. Plaintiffs took no further action with regards to Cestari's employment-based visa
12 application until 2009. Id. at 51, ¶¶ 7-8. Meanwhile, the regulation governing the
13 validity of approved labor certifications was amended effective July 16, 2007,
14 rendering Andros, Inc.'s labor certification invalid, if not filed with an I-140 petition
15 by January 12, 2008.
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18 On January 17, 2003, United States Immigration and Customs Enforcement
19 ("ICE"), initiated removal proceedings against Cestari for failure, after admission as a
20 non-immigrant, to maintain or comply with the conditions of non-immigrant status.
21 AR at L15-7; see also AR at L26. In July, 2003, Cestari applied for asylum. See AR
22 at L170. On September 10, 2003, the Immigration Judge ("IJ") denied Cestari's
23 application for asylum and ordered her removed. AR at L111. The IJ granted Cestari
24 voluntary departure, allowing her until November 10, 2003, to depart the United
25
26

1 States. Id. Cestari did not leave the country as ordered, and the parties do not dispute
2 that she has been unlawfully present in the United States for approximately seven
3 years.³

4
5 On March 19, 2009, after Cestari's priority date⁴ had become current, Andros,
6 Inc. submitted a Petition for Alien Worker (Form I-140) to have Cestari classified in
7 the appropriate preference category. AR at L363-405; see also SAR at 2-6. On March
8 23, 2009, Andros, Inc.'s application materials and fees were returned because the I-
9 140 petition was not supported by a valid labor certification. SAR at 16. Meanwhile,
10 prior to the filing of the I-140 petition, on May 1, 2007, Andros, Inc. became a
11 dissolved corporation. Gov't Ex. A, docket no. 19-1.

12 **DISCUSSION**

13 **A. Summary Judgment Standard**

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15 Summary judgment shall be granted if no genuine issue of material fact exists
16 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
17 The moving party bears the initial burden of demonstrating the absence of a genuine
18 issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When a
19 properly supported motion for summary judgment has been presented, the adverse
20

21
22 ³ Subsequent to the IJ's decision, Cestari was involved in a number of proceedings before the
23 Board of Immigration Appeals ("BIA"), none of which granted her the relief sought. See AR
24 at L224-5, L228, L317. Sometime in 2009, Cestari retained new counsel and filed an appeal
25 with the Ninth Circuit seeking review of the IJ's decision; that appeal is currently pending.

26 ⁴ The "priority date" is the date on which the application for labor certification was filed, as
defined by 8 C.F.R. § 204.5. The "priority date" becoming current indicates that an
immigrant visa number is available for an applicant.

1 party “may not rely merely on allegations or denials” of its pleadings. Fed. R. Civ. P.
2 56(e). The non-moving party must set forth “specific facts” demonstrating the
3 existence of a genuine issue for trial. Id.; Anderson v. Liberty Lobby, Inc., 477 U.S.
4 242, 256 (1986).

6 **B. The Statutory Framework**

7
8 The Immigration and Naturalization Act (“INA”), codified under Title 8 of the
9 United States Code, and its accompanying regulations, sets out a three-step process for
10 obtaining an employment-based immigrant visa. The process consists of (1) issuance
11 of a labor certification from DOL, (2) classification of the foreign worker by USCIS in
12 the appropriate preference category, and (3) issuance of a visa (if the alien is outside of
13 the United States) or the approval of an adjustment of status (if alien has already been
14 admitted to the United States.)

15
16 The first stage of this process involves the certification by DOL that the issuance of
17 an employment-based visa and admission of the alien worker to the United States will
18 not have an adverse affect to the American labor force. The relevant statute provides
19 in part:

20
21 “In order for an alien to obtain an employment-based immigrant visa for entry
22 into the United States, the Department of Labor (“DOL”) must first certify that:
23 (1) There are not sufficient United States workers who are able, willing,
24 qualified and available at the time of application for a visa and admission into
25 the United States and at the place where the alien is to perform the work; and
26 (2) The employment of the alien will not adversely affect the wages and
working conditions of United States workers similarly employed.”

1 See 8 U.S.C. § 1182(a)(5)(A)(i)(I-II). The employer applies for a DOL labor
2 certification by filing an Application for Permanent Employment Certification
3 (electronic Form ETA-9098). See 20 C.F.R. § 656.17(a).⁵
4

5 During the second stage, if a labor certification is issued by DOL, the employer
6 then files a Petition for Alien Worker (Form I-140) with USCIS, in order to have the
7 foreign-worker beneficiary classified in the relevant preference category under
8 8 U.S.C. § 1153(b).
9

10 At the third stage of the process, upon the approval of the Form I-140 petition,
11 and once the applicant's priority date becomes current, the beneficiary employee can
12 file to obtain an immigrant visa. If outside of the United States, the beneficiary
13 employee can apply for an immigrant visa at their local consular office. See 22 C.F.R.
14 § 42.61. If the alien has already been admitted to the United States, the alien can apply
15 for an adjustment of status by filing a Form I-485 with USCIS. 8 U.S.C. § 1255.
16

17 **C. Standing**

18 To bring suit in federal court, a plaintiff must establish constitutional standing.
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20 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To meet the threshold
21 requirement of standing, the plaintiff bears the burden of demonstrating (1) an injury
22 in fact, (2) causation, and (3) redressibility. Id. at 561. Injury in fact requires more
23 than an injury to a cognizable interest; it requires that the party seeking review be
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25 ⁵ Prior to March 28, 2005, an employer applied for labor certification by filing Application for
26 Alien Employment Certification (Legacy Form ETA-750). 20 C.F.R. § 656.21 (2004).
Andros, Inc.'s labor certification was filed under the predecessor regulation, so references in
this case will be made to DOL's Legacy Form ETA-750.

1 himself among the injured. Id. at 563. Furthermore, “[r]edressibility requires an
2 analysis of whether the court has the power to right or to prevent the claimed injury.”
3 Gonzalez v. Gorsuch, 688 F.2d 1263, 1267 (9th Cir. 1982). A party must show a
4 “substantial likelihood” that the relief sought would redress the alleged injury. Lujan,
5 504 U.S. at 561; see also Mayfield v. U.S., 599 F.3d 964, 971 (9th Cir. 2010). For the
6 reasons below, the Court concludes that Plaintiffs have failed to demonstrate a
7 redressible injury.⁶

8
9 The Government argues that both Cestari and T. Kazakos, Inc. lack standing
10 because their harm, if any, is not redressible through a favorable decision by this
11 Court. The Government maintains that even if USCIS was ordered to adjudicate the
12 I-140 petition filed on Cestari’s behalf, Cestari is statutorily ineligible for adjustment
13 of status, due to her failure to maintain lawful presence in the United States. See
14 8 U.S.C. § 1255(c)(2), (7). Plaintiffs respond that Cestari is eligible for adjustment of
15 status because Cestari is grandfathered-in under INA § 245(i), 8 U.S.C. § 1255(i).
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19 ⁶ With regard to Cestari’s standing, district courts have held that an alien lacks Article III
20 standing to challenge the denial of an immigration petition where the alien is not the petitioner
21 but merely the beneficiary. See George v. Napolitano, 693 F.Supp.2d 125, 130 (D.D.C.
22 2010); see also Li v. Renaud, 709 F.Supp.2d 230, 236 n.3 (S.D.N.Y. 2010); see also Ibraimi
23 v. Chertoff, 2008 WL 3821678 (D.N.J. 2008). The parties cite no Ninth Circuit authority, and
24 the Court has found none, which addresses this issue squarely. The Court does not reach this
25 issue because Cestari ultimately lacks standing on other grounds. In addition, Flores,
26 Cestari’s husband, is present in this action as a derivative beneficiary of Cestari’s
employment-based visa proceeding. See Pls’ Mot. for Summ. J., docket 18 at 9:11-21. Flores
is not the proper plaintiff to assert Cestari’s rights in this action. See generally Warth v.
Seldin, 422 U.S. 490, 499 (1975) (“plaintiff generally must assert his own legal rights and
interests, and cannot rest his claim to relief on the legal rights or interests of third parties”).
The Court concludes that Flores lacks standing and his claims are DISMISSED with
prejudice.

1 Section 245(a) of the INA provides that an alien who is already admitted to the
2 United States can adjust their status to that of an alien admitted for permanent
3 residence “if . . . (2) the alien is eligible to receive an immigrant visa and is admissible
4 to the United States for permanent residence, and (3) an immigrant visa is immediately
5 available to him at the time his application is filed.” 8 U.S.C. § 1255(a). Section
6 245(c), excludes certain aliens by stating that “subsection (a) of this section shall not
7 be applicable to an alien who . . . accepts unauthorized employment prior to filing an
8 application for adjustment of status or who is in unlawful immigration status on the
9 date of filing the application for adjustment of status or who has failed . . . to maintain
10 continuously a lawful status since entry into the United States; . . . or who has
11 otherwise violated the terms of a nonimmigrant visa.” 8 U.S.C. § 1255(c). Shortly
12 after being admitted to the United States, Cestari began unauthorized employment with
13 Andros, Inc. Subsequently, on September 10, 2003, the IJ found that Cestari had
14 violated her nonimmigrant student status and was removable from the United States.
15 Due to her accepting unauthorized employment and her failure to maintain lawful
16 status, Cestari is ineligible to apply for adjustment of status under Section 245.
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21 In response, Cestari argues that she is grandfathered-in under Section 245(i).
22 Section 245(i) provides that notwithstanding subsections (a) and (c), an alien who was
23 physically present in the United States on December 21, 2000, and is the beneficiary of
24 a labor certification application filed pursuant to DOL regulations on or before April
25 30, 2001, may apply for the adjustment of his or her status to that of an alien lawfully
26

1 admitted for permanent residence. 8 U.S.C. § 1255(i)(1). Plaintiffs allege that they
2 mailed an application on or before April 30, 2001. However, there is no credible
3 evidence in the record to support such an allegation. Under the summary judgment
4 standard, mere allegations are not enough. See Matsushita Elec. Indus. Co. v. Zenith
5 Radio Corp., 475 U.S. 574, 586 (1986) (a party cannot create a genuine issue of fact
6 by asserting “some metaphysical doubt” as to a material fact). Moreover, even if an
7 application was mailed before or on April 30, 2001, such an application is not
8 considered properly filed under the statute until the application is received *and*
9 *accepted* for processing. See 8 C.F.R. § 245.10(a)(1)(i)(B), (2)(i). The record lacks
10 any evidence that an application, mailed prior to the April 30, 2001, cut-off date, was
11 received and accepted for processing. In addition, Plaintiffs in their filings with the
12 USCIS seem to concede that the priority date is February 2002, rather than April 30,
13 2001. See SAR at 7. The Court concludes that Plaintiffs have failed to establish that
14 Cestari qualifies for the exemption under Section 245(i).⁷

15 Although it is possible that Cestari may apply for and be able to obtain a visa
16 some ten years after her departure, this possibility does not establish a “substantial
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18 ⁷ Plaintiffs also argue that even if Cestari is ineligible to apply for adjustment of status, she
19 can leave the United States and apply for a visa from her home country. However, to be
20 approved for a visa, Cestari must be admissible to the United States. See 8 U.S.C.
21 § 1201(g)(1). An alien who departs the United States after being unlawfully present for one
22 year or more is inadmissible to the United States for ten years. See 8 U.S.C.
23 § 1182(a)(9)(B)(i)(II). After being declared removable by the IJ in 2003, Cestari has been
24 unlawfully present in the United States for nearly seven years. Thus, Cestari is inadmissible
25 under the statute and is therefore ineligible for a visa for at least ten years after departing the
26 United States.

1 likelihood” that the relief sought (i.e. the adjudication of the I-140 petition filed on her
2 behalf) would redress Cestari ultimate injury, her current inability to obtain permanent
3 residency in the United States. The Court concludes that Plaintiffs have failed to
4 demonstrate a redressible injury, and therefore lack standing to challenge the DOL
5 regulation.
6

7 **CONCLUSION**
8

9 For the foregoing reasons, the Court ORDERS as follows:

10 (1) Plaintiffs’ motion to substitute real party in interest, docket no. 22, is
11 GRANTED; T. Kazakos, Inc. is SUBSTITUTED for Andros, Inc. as plaintiff in this
12 action;
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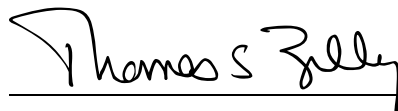
14 (2) Defendants’ motion for summary judgment, docket no 17, is
15 GRANTED;

16 (3) Plaintiffs’ cross-motion for summary judgment, docket no 18, is
17 DENIED;

18 (4) This case is DISMISSED with prejudice; and

19 (5) The Clerk is directed to enter JUDGMENT consistent with this Order
20 and to send copies of this Order to all counsel of record.
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22 DATED this 2nd day of December, 2010.
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26 Thomas S. Zilly
United States District Judge